

THE MARK O. HATFIELD

# COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the  
U.S. District Court for the District of Oregon  
A Court Publication Supported by the Attorney Admissions Fund  
Vol. IX, No. 9, May 12, 2003

## Employment

A federal employee claimed that his former job was improperly classified and that his requests for an upgrade were denied based upon his race and gender. However, because plaintiff's request for re-classification was denied over four years prior to his initiating contact with an EEO counselor, plaintiff's claims were not exhausted as required by the Code of Federal Regulations. Judge Marsh held that the time limit barred plaintiff from pursuing his claims and that no equitable considerations excused the delay. The court found that plaintiff's numerous attempts to seek reconsideration did not toll the period since plaintiff was unable to point to any information that was not known to him at the time of the original decision. Further, the fact that plaintiff was an EEO specialist meant that he was intimately familiar with applicable filing deadlines. Tijerina v. U.S. Dept. of Energy, CV 02-1254-MA (Opinion, May 7, 2003).

Plaintiff's Counsel: Mark Morrell  
Defense Counsel:

Judith Kobbervig

7 Plaintiff filed a proposed class action wage claim in County Circuit Court. Plaintiff contends that his former employer failed to pay all

wages due on his last date of employment following a notice of termination. Defendant removed the action to federal court based upon LMRA preemption. Judge Anna J. Brown noted that while the applicable CBA included a provision about payment of wages for the end of service, there was no provision addressing payment following an involuntary termination. Plaintiff's claims relied exclusively upon Oregon statutory law rather than the terms of the CBA. Accordingly, the court granted plaintiff's motion for remand. Anderson v. Xerox Corp., CV 03-119-BR (Opinion, May 8, 2003).

Plaintiff's Counsel:

David Schuck;

Jacqueline L. Koch

Defense Counsel:

Lois O. Rosenbaum

7 A former teacher filed an action against a school district, several co-workers and the School Board Chair claiming that she was disciplined and dismissed in retaliation for her public statements regarding the rights of a disabled student. Defendants came forward with evidence that, while numerous complaints were raised by parents and co-workers

beginning shortly after plaintiff was hired, the dismissal was because plaintiff lacked a valid teaching certificate.

Judge Ann Aiken examined plaintiff's free speech claims and found that her interactions with fellow teachers did not constitute protected speech, nor were her co-workers responsible for any adverse employment decisions. The court found no evidence of retaliatory motive or pretext and dismissed all claims against the School Board Chair and the District. Judge Aiken assumed, without deciding, that a non-disabled person could bring an action for retaliation under the federal Rehabilitation Act, but the plaintiff's claim failed for lack of evidence of discriminatory motive. Plaintiff's claims for violation of the Oregon Whistleblowers' Act, defamation, false light and intentional infliction of emotional distress were all rejected and defendants were granted summary judgment on all claims. Jankowski v. Monument School Dist., CV 02-170-AA (Opinion, April, 2003).

Plaintiff's Counsel:

William Goode

Defense Counsel:

Thomas S. Moore

## Announcement

The Criminal Procedure Committee, formed by Chief Judge Haggerty, held its first meeting on May 2, 2003, at the Federal Courthouse in Eugene, Oregon. Committee members are: Judge Aiken/Judge Jelderks - Co-Chairs, Judge Coffin, Barry Sheldahl (AUSA - PDX) for Mike Mossman, U.S. Attorney, Dennis Merrill, U.S. Marshal, Cyndi Swearingen (Pretrial Services), Eric Suing (Probation), Steve Wax (Federal Defender - PDX), Don Mixon (Assistant Federal Defender - Medford), Mark Weintraub (Assistant Federal Defender - Eugene), Tonia Morrow (Assistant Federal Defender - Medford), Shaun McCrea (Attorney - Eugene), Lynn Shepard (Attorney, CJA - Eugene), Bob Reid (Attorney, CJA - PDX), Marc Blackman (Attorney - PDX), Kelly Beckley (Attorney - Eugene), Danny Armstrong (Clerk's Office - PDX), and Jolie Russo (Committee Staff assisting Judge Aiken). Added Committee members are: Judge Cooney (Medford), John Ray (AUSA - Eugene), and Bob Thomson (AUSA - Medford).

The Committee was formed to help monitor and problem-solve any issues that arise for the U.S. District Court's criminal docket and criminal practitioners state-wide. The Committee also exists as a forum for complaints and concerns, and to discuss and implement suggestions by Bar members. Bar members are encouraged to contact any Committee member with comments

or topics. The next Committee meeting is scheduled **June 17, 2003, from 10am - 2pm at the Federal Courthouse in Eugene, Oregon.** Interested parties may contact any Committee member directly, or may contact members anonymously.

## Insurance

An insured disabled by severe depression over the loss of a child filed claims with two different insurers over ten years after her claimed onset date. One insurer chose a limitations period more favorable than that of the Oregon statute, but plaintiff's claim was still untimely and therefore barred under the terms of the contract. The other insurer chose a shorter limitations period and argued that plaintiff should have submitted monthly proofs of claim. Judge Dennis J. Hubel examined the contract under both contractual and statutory construction principles and found that under the second insurer's policy, plaintiff did not have to file a proof of loss until her disability ceased. Judge Hubel noted that he was required to construe ambiguous language in favor of the insured. Accordingly, the first insurer's summary judgment motion was granted and the second insurer's summary judgment motion was denied. Kennedy v. New York Life Ins. Co., CV 01-1372-HU (Opinion, March 27, 2003). Plaintiff's Counsel:

Michael J. Knapp  
Defense Counsel:

Robert C. Miller

## Federal Torts

Plaintiff was injured when he rode his ATV onto a BLM road and into a "tank trap" style trench. The BLM had created the trench to discourage illegal dumping. Judge Ann Aiken held that the defendant could not be liable because the challenged activity fell within Oregon's Recreational Use statute. The court reviewed the law relative to road "closures" under applicable federal regulations and noted that while there was proof of the government's intent to close the road, the road was legally designated as open when the accident occurred. Williams v. BLM, CV 00-6227-AA (Opinion, May, 2003).

Plaintiff's Counsel: Ron L. Sayer  
Defense Counsel:

James Sutherland

## Save the Date

The Oregon Chapter of the Federal Bar Association and the U.S. District Court of Oregon Historical Society will present: "An Introduction to Federal Court: Federal Practice and Procedure for Summer Associates and Law Clerks" on Wednesday, June 18, 2003 from noon to 4:30 p.m. at the Mark O. Hatfield U.S. Courthouse. This is an excellent opportunity for aspiring new practitioners to meet the federal District Court judges, tour the courthouse and learn the ins and outs of Portland's federal court system. Questions or to register, contact: [Seth.row@bullivant.com](mailto:Seth.row@bullivant.com)

### 3 The Courthouse News

|

|